24th Annual Stockbrokers' Conference

Rebirth of CAMA: Implications for the Capital Markets Ecosystem

Good morning distinguished ladies and gentlemen. I hope we are all keeping safe in these very difficult and stormy times. The year 2020 is a year such as never been seen before and by the grace of the Almighty never to be seen again. Also, after the American election results are officially called later this morning, the politics and economics of the world may change, and every country that seeks to grow and meet the aspirations of its people must be extremely well managed.

The theme of this 24th Annual Conference is truly apt; "***Navigating Through the Storms – Re-energizing the Economy Through the Capital Market".***

First and foremost, I would like to thank the Council of the Chartered Institute of Stockbrokers, the President and Chairman of Council, the Registrar, and the Chairman of the Programmes Committee for inviting me to participate in this seminar and deliver this paper titled ***"Rebirth of CAMA: Implications for the Capital Market Ecosystem"***.

What is the impact of the recently enacted Companies and Allied Matters Act, 2020 on the Nigerian Capital Market? Does this new law support the strengthening, deepening, widening and or improvement of the Nigerian capital market? Will it aid the stimulation of activities on the

market and aid the accumulation of badly needed capital required to; reflate our economy, enhance company investments, and build needed infrastructure? Will this new Companies Law support the upscaling of the capacities of our operators and regulators, and help bring our market fully and technologically into the 21st century? Do the provisions of the Act assist in improving market governance, transparency and investor protection?

On balance, will this new law have a positive, neutral or possibly negative impact on our capital market ecosystem? I am clear in my mind that until we have a strong, efficient, and deep capital market, fairly regulated and regulated to attract depth, we will struggle with our pace of development.

The Companies and Allied Matters Act 2020 is the primary legislation on Companies; business regulation, company and partnerships formation and governance; company structures, business combinations, share issuance, vehicles for establishing business names, bankruptcy and winding up proceedings in Nigeria. It is therefore extremely important that this law is clear, precise and covers the field to enable the development of a 21st century Nigerian economy in compliance with international best practices. If well crafted, the law must support the creation of an enabling business and investment environment, ease of doing business, a creative, deep, wide and effectively regulated capital market, strong and sustainable Nigerian private sector institutions and trust in our financial markets.

In the course of this speech, for ease of reference, I will be referring to the Companies and Allied Matters Act of 1990 as the Repealed Act and the Companies and Allied Matters Act 2020 as CAMA 2020 or the Act.

Over the last thirty years, companies and businesses have had to rely on the Repealed Act which was enacted in 1990, and had become antiquated day by day, to govern their business operations. By the beginning of the 21st century, it was clear that the Repealed Act needed to be amended to accommodate business realities in a fast changing and technologically advancing world and thereby catalyse the development of an inclusive Nigerian economy.

I believe that the Act introduces provisions which will aid and improve activities within the Nigerian capital market. Provisions which are good for our ecosystem. However, the Act also appears to contain provisions which may hinder the market . Let me start by discussing the provisions which in the short, medium and long term are good for our market.

1. The framework for implementing mergers

Since the repeal of the 1999 Investment and Securities Act by its successor Act in 2007, certain levels of uncertainty and ambiguity had crept into the process of implementing mergers and business combinations. Efficient markets do not thrive in a climate of uncertainty and unpredictable regulatory discretion.

The repeal of Sections 118 - 128 of the Investment and Securities Act by the Federal Competition and Consumer Protection Act 2019(the "FCCPA") threw worse spanners in the works by now totally removing the patchy statutory framework for mergers. This created a gap in the legal process for merger transactions in Nigeria and confused the market. I am truly happy that this gap has now been effectively plugged with the reintroduction of merger provisions in Section 711 of the Act.

With the introduction of Section 711 of the Act, companies intending to merge can follow the statutory procedure clearly set out in the said section, in addition to any other regulatory requirement. Section 711 positively impacts the Capital Market Ecosystem.

2. **Removal of the limitations on the implementation of a Company's share buyback transactions**

In line with international best practices, Section 184 of CAMA 2020 enables a company to acquire its own shares (i.e. share buyback) subject to compliance with specific conditions in this section. This is a welcome amendment to the buyback provisions of the Repealed Act as it substantially eases this process and reduces restrictions. Share buy backs typically help businesses reduce capital cost and improve shareholder value. Financially competent companies are attractive and can easily access the capital market.

Prior to the enactment of CAMA 2020, share buybacks could only be done in very limited circumstances. However, with the enactment of CAMA 2020, limited liability companies may purchase their own shares, including redeemable shares once they fulfill the specified conditions under section 184 of the Act. These conditions include:

a. The Company's Articles of Association must permit it to undertake buy back transactions;
b. The shareholders must pass a special resolution authorizing the Company to undertake the buy back;
c. Only fully paid-up shares can be purchased in a buy back;
d. Notice of the proposed share buy-back must be published in two (2) national newspapers within seven (7) days of the passing of the special resolution;
e. Directors' statutory declaration must be filed at CAC within fifteen (15) days after the publication;
f. Creditors or a dissenting shareholder may make an application to the FHC for an order cancelling the resolution for a share buy-back within six (6) weeks of the publication;
g. Payment for share buy-back is restricted to the distributable profits of the company. Proceeds of fresh issue of shares can no longer be used to pay for the shares being bought back by the company.

3. Section 183 – Relaxation of the restrictions on Financial Assistance.

Under the Repealed Act, the provisions of financial assistance directly or indirectly by a company for the acquisition of its own shares was prohibited save for certain very narrow circumstances, mainly for the setting up of an employee share scheme or employee share ownership agreement.

Section 183 of CAMA 2020 now permits financial assistance by a company in furtherance of anything done in pursuance of an order of the court under a scheme of arrangement; a scheme of merger or any other scheme or restructuring of a company done with the sanction of the Court; or an assistance given by a company where its principal purpose in giving the assistance is not to reduce or discharge any liability incurred by a person for the purpose of the acquisition of shares in the company or its holding company, or the reduction or discharge of any such liability, but an incidental part of some larger purpose of the company, and the assistance is given in good faith in the interests of the company.

Private companies are also now permitted to provide financial assistance to an acquirer if net assets are not reduced or if such assistance is provided from distributable profits, there is a special resolution of the company and directors of companies involved give statutory declaration in specified form.

This is a welcome amendment to the provisions contained in the Repealed Act. It will enable more transactions on the market

especially “debt push down mergers”, and encourage value adding acquisition transactions

4. Improved Corporate Governance of public companies.

One of the greatest and most effective drivers of a virile, deep and efficient capital market is the preponderance of well governed and effectively regulated issuers in the market. Well governed entities with strong, visionary and knowledgeable Boards and efficient and transparent Management always attract capital and can easily raise money on the market for their long-term investments and capital formulation. The Act makes specific provisions which in the medium to long term will enhance and improve corporate governance in public companies.

Some of these provisions are:

(a) **Restriction on Multiple Directorships in Public Companies**: Pursuant to Section 307 of CAMA 2020, a person is prohibited from being a director in more than five public companies. This confirms but narrows the provisions of the Nigerian Code of Corporate Governance which recognizes that directors may hold concurrent directorships but provides that, directors should not be members of boards of competing companies, to avoid conflict of interest breach of confidentiality, diversion of corporate opportunity and divulgence of corporate information and secrets. I know from personal experience that it takes immense discipline

and hardwork to be an efficient director if you sit on too many boards. Companies with inefficient directors will be poorly governed.

(b) **Disclosure of substantial interest**: Section 120 of CAMA 2020 reduces the threshold of what will amount to substantial shareholding in public companies from 10% to 5%. It provides that a person who is a substantial shareholder either directly or indirectly (concept of beneficial ownership), shall give notice in writing to the company. Where a company receives notice that a person has acquired substantial interest in a company directly or indirectly, the company shall within 14 days of receipt of the notice or of becoming aware that a person is a substantial shareholder give notice in writing to the Corporate Affairs Commission (the "CAC") of this fact. Failure to notify the CAC attracts a fine as the CAC may prescribe by regulation.

I believe that this provision will enhance transparency and reduce asset shielding.

(c) **Disclosure by directors of interests in contracts**:

Pursuant to section 303 of CAMA 2020, directors are now specifically required to immediately notify the company in writing where the director is directly or indirectly interested in a transaction or proposed transaction involving the

company. Although the disclosure requirement was already contained in the Repealed Act , the Repealed Act did not require that such notification be made immediately and loosely provided that “in the case of proposed contracts, the declaration to be made by a director shall be made at the meeting of the directors at which the question of entering into the contract is first taken into consideration, or, if the director was not at the date of that meeting interested in the proposed contract, at the next meeting of the directors held after he became so interested, and in a case where the director becomes interested in a contract after it is made, the said declaration shall be made at the first meeting of the directors held after he becomes so interested.

(d) Statutory separation of the role of Chairman and CEO

Section 265 (6) of the Act codifies the corporate governance concept that the Chairman of a public company cannot also be the CEO of the same company. This statutorily ensures that governance and management powers are not concentrated in one person, enables appropriate checks and balances and substantially reduces the scope for abuse of powers.

5. Netting and bankruptcy remoteness provisions.

(a) Netting:

Section 718 of the Act introduces the concept of netting which involves offsetting or reducing exposure or obligations by combining two or more obligations to achieve a reduced net obligation. Section 721 clearly specifies that the provisions of a netting agreement are enforceable against an insolvent party, guarantor or any other person who provided security for a party in a netting agreement.

The benefits of these provisions of the Act include: the reduction of settlement, liquidity or credit risks, the creation and derisking of derivatives and swaps and other over the counter transactions and instruments, by providing legal and credit protection for these transactions. These provisions are highly commended, creative, forward looking and in line with the evolution of derivative and swap transactions and will deepen and enhance our market.

(b) Bankruptcy Remoteness

By the provisions of Sections 443 to 537 of the Act, companies in financial difficulties which if differently managed can trade out of difficulties and or which have strong underlying assets can, rather than being liquidated or wound up as was often the case, be rescued under the management of an Administrator . The revival of such companies, especially those that are public companies or large private companies sustains their ability to continue participating effectively in market transactions, preserves assets, preserves capital and saves jobs.

In a public statement by the FMDQ, it admitted that "***these game changing provisions will cure critical legal deficiencies that hitherto affected the development of the financial markets, with the netting provisions addressing the credit risk challenges, operational and legal bottlenecks of gross settlement for spot and derivatives transactions, and the bankruptcy remoteness provisions tackling the uncertainty around the finality of settled transactions whilst securely ring-fencing collaterals placed in execution of financial contracts***".

6. Simplification of the process of the incorporation of private companies.

CAMA 2020 simplifies the requirements for incorporating companies by:

(a) reducing the number of individuals required for the incorporation of private companies from two to one (small scale entrepreneurs are able to easily incorporate companies without contemplating additional shareholders or diluting their equity interest at the start);
(b) the recognition of electronic signatures on documents;
(c) providing for exemption from registration by foreign companies, by application to the Minister of Industry, Trade

and Investment and no longer to the President through the Secretary to the Government;

(d) permitting companies to validate shares that had been issued improperly;

(e) Permitting small companies and companies having a single shareholder to hold statutory and annual general meetings virtually.

These provisions have immense long-term benefits for the market. Many more sole owners and entrepreneurs are now able to properly structure their business vehicles from the onset. Hopefully a high percentage of such entities would grow and survive to the point where when they seek to scale or attract investment they will enter the capital market and or require the services of capital market operators.

7. Relaxation of compliance requirements for small companies.

The Act reduces certain compliance requirements (and as a consequence reduces their operating costs) for small companies. These include:

(a) Exemption from the requirement to undertake statutory audits[1];

(b) Exemption from convening statutory and annual general meetings[2];

[1] Section 402

[2] Section 237

(c) Preparation of financial statements with fewer disclosure requirements[3];
(d) Provision of single directorship[4]; and
(e) Exemption from mandatorily appointing company secretaries[5].

By virtue of Section 394 of CAMA 2020, a company qualifies as a small company in relation to its first financial year if the qualifying conditions outlined below are met:

(a) It is a private company;

(b) Its turnover is not more than N120,000,000 or such amount as may be fixed by the CAC from time to time;

(c) Its net assets value is not more than N60,000,000 or such amount as may be fixed by the CAC from time to time;

(d) None of its members is an alien;

(e) None of its members is a government, government corporation or agency or its nominee; and

(f) In the case of company having share capital, the directors between themselves hold at least 51% of its equity share capital. A company qualifies as small in relation to a subsequent financial year if the above qualifying conditions (i) are met in that year and the preceding financial year; (ii) are met in that year and the company qualified as small in

[3] Section 424
[4] Section 271
[5] Section 330.

relation to the preceding financial year; or (iii) were met in the preceding financial year and the company qualified as small in relation to that year.

The relaxation of these compliance requirements also support the long term benefits to the market which I highlighted under 6 above.

8. The recognition of limited liability partnerships and limited partnerships

Prior to now, business activities in Nigeria could be undertaken only through any of the following legal structures: (i) private or public limited liability company; (ii) unlimited liability company; (iii) company limited by guarantee, (iv) incorporated trustees; and (v) business names.

Sections 746 – 810 of the Act now recognizes Limited Liability Partnerships and Limited Partnerships as corporate entities and these entities are acknowledged as being separate from their partners, can sue and be sued in their name, have perpetual succession and can acquire, hold and dispose of properties in their name.

Essentially, Limited Liability Partnerships and Limited Partnerships are well suited for establishing private equity funds and service firms because of the organizational flexibility they provide, limited liability nature and the tax transparency.

Strong and well-organized private equity funds and professional advisers enable the growth and suitability of entities which

ultimately access the market. One of the primary options of PE firms investment exit is the listing of the companies they invested in.

9. Reduction in the fees for registration of security[6]

Under the Repealed Act, the registration fee for charges on assets was assessed at approximately 1% and 2% of the secured amount for private and public companies respectively. However, CAMA 2020 stipulates that the total fees payable to the Corporate Affairs Commission (the "**CAC**") in connection with the filing, registration or release of any registrable charge shall not exceed 0.35% of the value of the charge or such other amount as the Minister of Industry and Trade may specify in the Federal Government Gazette, and does not distinguish between the registration fee payable where the security is in respect of the assets of a public or private company.

This provision will effectively reduce the costs associated with secured financing and long-term debts and increase the volume of these transactions in the market.

Whilst CAMA 2020 amends and addresses a number of the loopholes and problem areas in the Repealed Act, and also tried to revise our Companies statute to bring same in tune with the 21st century, it would

[6] Section 222 (12) of CAMA 2020

appear that the introduction of some oversight provisions and concepts suggest an overregulation of companies and company practices. Some of these excessive regulatory provisions actually impede transactions in the market. Additionally, there are specific sections of the Act which should have been amended. Some of these include:

A. Pre-emptive rights of shareholders

Section 142 of the Act provides that a company shall not in any event allot newly issued shares unless they are offered in the first instance to all existing shareholders of the class being issued in proportion as nearly as may be to their existing holdings. The applicability of this provision does not distinguish private and public companies.

The implementation of this provision will pose significant problems for public companies seeking to raise capital by the issuance of new shares. In undertaking such capital raising transactions, public companies would not be able to make public offers or undertake private placements without first making an offer to all their shareholders.

This amendment has raised concern amongst operators, corporates and investors, and is a significant deviation from the provision of the Repealed Act which only specified preemptive rights for **private companies.**

I align with these concerns as this provision may restrict public companies intending to undertake equity capital raise and restrict (or at best delay) the admission of strategic investors, because the offensive provision implies that companies will not be able to undertake public offer transactions or private placements without first going through the process of formally making an offer to their shareholders.

B. Dematerialization of shares and share certificates

Section 171 (1) of CAMA 2020 retained the provisions of the Repealed Act regarding the issuance of share certificates. This should have been amended in line with current realities. It provides that every company shall, within two months after the allotment of any of its shares and within three months after the date on which a transfer of any such shares is lodged with the company, complete and have ready for delivery the certificates of all shares allotted or transferred, unless the conditions of issue of the shares otherwise provide.

Unfortunately, the Act does not recognize the dematerialization of shares which is an acceptable proof of ownership of securities in developed jurisdictions, thereby retaining the cost of printing and delivery of physical share certificates, and foregoing the obvious advantages of dematerialized instruments, and the promptness and immediacy that these bring to market transactions .

C. Power of companies to allot shares vis a vis the provision on the increase of issued share capital in companies

Under the Repealed Act, the power of companies to allot shares could be delegated to the directors of any type of company, however Section 149 of CAMA 2020 provides that the power to allot shares is vested in the company, and, in relation to a private company, this power may be delegated to the directors, subject to any condition or direction that may be imposed in the articles or by the company in general meeting.

However, Section 127 of CAMA 2020 provides that an increase in the share capital in a company shall be done by the allotment of new shares **at a general meeting and not otherwise.**

In practice, the provisions of section 127 may increase the transaction timelines and costs for public companies seeking to undertake an equity capital raise. It would appear that such public companies will need to convene two general meetings in a capital raising process; the first meeting to authorize the company to undertake the offer and the second meeting to authorize the allotment of shares following subscription by investors.

D. Proscribing issuance of irredeemable preference shares

Section 147(1) of the Act proscribes the issuance of irredeemable preference shares by limited liability companies. I do not agree that Government should by statute determine the type of instruments companies can issue to raise capital. The market should be expanding types of instruments available to companies. The appropriateness of financial instruments redemption should also only be reserved for shareholders.

On balance I believe this reborn CAMA should substantially enhance our Capital Market Ecosystem and significantly nudge it into the 21st century. Hopefully sections 127 and 142 which I see as a hinderance to the efficiency of market transactions may soon be reviewed and amended.

Thank you.

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